APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed Oct.31, 2000]

No. 00-50014

D.C. Docket No. EP-99-CV-320-H

STATE OF TEXAS

Plaintiff-Appellee

v.

YSLETA DEL SUR PUEBLO; TIGUA GAMING AGENCY; THE TRIBAL COUNCIL; FILBERT CANDELERIA, TRIBAL ACTING GOVERNOR; FRANCISCO HERNANDEZ, GAMING COMMISSIONER

Defendants - Appellants

Appeals from the United States District Court
for the Western District of Texas, El Paso.

Before DAVIS, EMILIO M. GARZA, Circuit Judges, and POGUE*, Judge.

J U D G M EN T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

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* Judge of the U.S. Court of International Trade, sitting by designation.

IT IS FURTHER ORDERED that defendants-appellants pay to plaintiff-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: Jan 03,2001

A true Copy
Test

/s/ Sabrina Barrax

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed Oct 31, 2000]

No. 00-50014

STATE OF TEXAS,
Plaintiff-Appellee,

Versus

YSLETA DEL SUR PUEBLO; TIGUA GAMING AGENCY; THE TRIBAL COUNCIL; FILBERT CANDELARIA, TRIBAL ACTING GOVERNOR; FRANCISCO HERNANDEZ, GAMING COMMISSIONER;
Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas, El Paso Division

Before DAVIS, EMILIO M. GARZA, Circuit Judges, and POGUE, Judge *

PER CURIAM:**

The State of Texas brought suit against Ysleta del Sur Pueblo (the "Tribe") seeking to enjoin the Tribe from violating Texas anti-gaming laws at its Speaking Rock Casino. The Tribe responded by filing a motion to dismiss

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* Judge of the U.S. Court of International Trade, sitting by designation.

** Pursuant to 5th CIR. R. 47. 5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

for lack of subject matter jurisdiction on the basis of tribal immunity. The District Court concluded that under the Restoration Act (25 U.S.C. § 1300g) tribal immunity as to the state's claims is unequivocally abrogated and waived. We AFFIRM.

This Court has previously addressed the history of the bargain struck between the Tribe, the State of Texas and Congress in the passage of the Restoration Act in *Ysleta del Sur Pueblo v. State of Texas*, 36 F.3d 1325 (5th Cir. 1994) ("Ysleta I"). Essentially, in order to obtain passage of the Restoration Act which provided for restoration of the federal trust relationship to the Tribe, the Tribe agreed and in fact requested that the act include language prohibiting all gaming prohibited under Texas state law. In *Ysleta I*, this court concluded that the Restoration Act governs the determination of whether gaming activities of the Tribe are allowed under Texas law, which operates as surrogate federal law on the reservation.

The Restoration Act at § 1300g-6 (a) clearly states that all gaming activities which are prohibited under the laws of the State of Texas are prohibited on the reservation. At § 1300g-6(c), the courts of the United States are recognized as having exclusive jurisdiction over any violation of the prohibition in subsection (a). The section also states that "nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section." Recognizing that suits against Indian tribes are barred by sovereign immunity in the absence of clear waiver by the Tribe or congressional abrogation, *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509, 111 S.Ct. 905, 909 (1991), we find that the Restoration Act represents a clear abrogation by Congress of the Tribe's immunity as to exactly the class of suit brought here—an action in the courts of the United States by the State

of Texas to enjoin violations of the anti-gaming provision of the act.

Accordingly, the district court's denial of the Tribe's motion to dismiss on the basis of its sovereign immunity was proper and the judgment of the district court is AFFIRMED. Because the only issue properly before us is the correctness of the district court's denial of immunity, other issues raised by the Tribe are not reviewable at this time.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed Dec. 12, 2000]

No. 00-50014

STATE OF TEXAS
Plaintiff-Appellee,

v.

YSLETA DEL SUR PUEBLO; TIGUA GAMING AGENCY; THE TRIBAL COUNCIL; FILBERT CANDELERIA, TRIBAL ACTING GOVERNOR; FRANCISCO HERNANDEZ, GAMING COMMISSIONER
Defendants – Appellants.

Appeals from the United States District Court
for the Western District of Texas, El Paso

ON PETITION FOR REHEARING
AND REHEARING EN BANC

(Opinion 10/31/00, 5 Cir.___, ___,F.3d___)

Before DAVIS, EMILIO M. GARZA, Circuit Judges, and POGUE, Judge*.

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* Judge of the U.S. Court of International Trade, sitting by designation.

Judge Jones did not participate in the consideration of the petition for rehearing en banc.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. App. P. and 5th CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. App. P. and 5th CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Illegible

UNITED STATES CIRCUIT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT,
FOR THE WESTERN DISTRICT OF TEXAS

[Filed Dec 3, 1999]

No. EP-99-CA-320-H

STATE OF TEXAS

Plaintiff,

v.

YSLETA DEL SUR PUEBLO, TIGUA GAMING AGENCY, THE TRIBAL COUNCIL, TRIBAL ACTING GOVERNOR FILBERT CANDELERIA, and GAMING COMMISSIONER FRANCISCO HERNANDEZ

Defendants.

Dec. 3, 1999

ORDER REGARDING DEFENDANTS' MOTION TO DISMISS

This is the case that asks the question: can the State of Texas enjoin gambling activities taking place on an Indian reservation located within its borders?[1] On September 27, 1999, the Attorney General of the State of Texas ("AG") commenced this action to enjoin Defendants from operating a gaming facility called "Speaking Rock Casino," located on the Ysleta del Sur Pueblo Tribe ("Tribe") reservation. In response, the Defendants, a group which includes the Tribe itself along with two tribal officials and the Tribal Council,

[1] Certain forms of gambling are prohibited in Texas. *See* Tex. Pen. Code Ann. § 47.01 et seq.; *see also* Tex. Const. Art. 3 § 47(a) (directing state legislature to pass anti-gaming laws).

filed a motion to dismiss pursuant to Federal Rules of Civil Procedure ("F.R.C.P.") 12(b)(1), 12(b)(6), and 12(b)(7). On November 12, 1999, Plaintiff responded. This case is now ripe for decision.

A. Background

The members of the Tribe are descendants of Indians who fled from New Mexico in the Pueblo Revolt of 1680. *See* W.H. TIMMONS, EL PASO: A BORDERLANDS HISTORY 17-24 (1990). After following the defeated Spaniards south, the Indian refugees, composed of members of several tribes, settled near what is now San Elizario, Texas, and formed what came to be known as the Ysleta del Sur Pueblo. *See id.* Throughout the eighteenth and nineteenth centuries, the Tribe retained a kinship-based tribal government. *See id.* at 181. In 1895, the Tribe adopted a constitution and by-laws to protect its traditions and culture from "Mexicanization." *See id.* In 1967, the State of Texas recognized the Tribe, and established the present reservation. *See id.* at 260. The following year, the federal government also recognized the Tribe, but delegated all its administrative responsibilities to the State of Texas. *See Ysleta del Sur Pueblo v. State of Texas*, 36 F.3d 1325, 1327 (5th Cir.1994) (*"Ysleta I"*).

In the mid-1980s, amidst concerns regarding the constitutionality of the arrangement, Congress established a new federal trust with the Tribe. *See Ysleta I*, 36 F.3d at 1327-28; Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, 25 U.S.C. § 1300g *et seq.* (1987) ("Restoration Act"). The Restoration Act purported to prohibit gambling on the reservation by incorporating state law; however, the Tribe tried to compel Texas to negotiate a "Tribal-State compact" pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 et seq. (1987). *See Ysleta del Sur Pueblo v. State of Texas*, 852 F.Supp. 587, 588-89 (W.D.Tex.1993). The Tribe hoped that an IGRA compact would result in federal authorization

of reservation gambling. The Fifth Circuit Court of Appeals ultimately resolved the question in favor of the State of Texas by holding that the Restoration Act, as opposed to IGRA, would govern the gambling question were a proper suit to arise. *See Ysleta I*, 36 F.3d at 1335-36.

Despite the implications of the Fifth Circuit's holding, the Speaking Rock Casino began operating in 1993. In 1998, however, the Tribe commenced a suit against the State of Texas for declaratory and injunctive relief to validate reservation gambling after the Governor of Texas opined that the Tribe was violating the Restoration Act. *See Ysleta del Sur Pueblo v. Bush*, No. P-98- CA-47, (W.D.Tex.Aug.7, 1998) ("*Ysleta II*"). The district court found that Texas had not waived its Eleventh Amendment immunity, and dismissed the case. *See id.* The Fifth Circuit affirmed, and the Tribe is now petitioning for a writ of certiorari from the United States Supreme Court. (Def. Mot. to Abate.)

Having also determined that activities at Speaking Rock were in violation of the Restoration Act, the AG commenced the instant lawsuit. In their motion to dismiss, Defendants raise the following claims: (1) Congress never waived the Tribe's sovereign immunity, (2) the United States must be joined as an indispensable party before the AG can proceed, and (3) the AG lacks capacity to sue the Tribe on behalf of the State of Texas.

B. Waiver of Sovereign Immunity

Defendants first argue that nothing in the Restoration Act constitutes a waiver of the Tribe's sovereign immunity. Alternatively, Defendants argue that the question of whether Plaintiff can bring suit should be governed by Public Law 280.[2] The Supreme Court has determined that Public Law

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[2] Public Law 280 is codified at 18 U.S.C. § 1162(a) and 28 U.S.C. § 1360(a). *See* Pub.L. No. 83-280, §§ 2, 4, 67 Stat. 588, 588-89 (1953). Under Defendants' theory, some of the language of Public Law 280

280 does not constitute a waiver of tribal sovereign immunity. *See Three Affiliated Tribes of Fort Berthold Reserv. v. Wold Eng'g*, 476 U.S. 877, 892, 106 S.Ct. 2305, 2314 (1987). Consequently, Defendants maintain, under either theory the Tribe is immune from suit, and the action should be dismissed.

Indian tribes enjoy common-law immunity from suit traditionally enjoyed by sovereign powers. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677 (1978). Although tribes have the power to regulate internal matters, make their own substantive laws, and enforce laws in their own forums, Congress can "limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." *See id.* at 55-57, 98 S.Ct. at 1676-77 (citing *Talton v. Mayes*, 163 U.S. 376, 384, 16 S.Ct. 986, 989 (1896)). Consequently, Congress may waive tribal immunity, provided that the waiver is "unequivocally expressed." *See id.* at 58-59, 98 S.Ct. at 1677.

The Restoration Act provides that "[a]ll gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe." *See* 25 U.S.C. § 1300g-6(a). All civil and criminal penalties relating to illegal gambling under state law apply on the reservation, and Congress granted exclusive jurisdiction to federal courts over actions involving gaming violations on the reservation. See 25 U.S.C. § 1300g-6(a-c). Most importantly, the Restoration Act allows the State of Texas to

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mirrors provisions of the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1301 et seq. (1968), even though the former statute applies only to certain tribes outside of Texas. Compare 28 U.S.C. § 1360 and 18 U.S.C. § 1162 with 25 U.S.C. §§ 1321-22. By contrast, ICRA applies to all federally-recognized tribes. *See* 25 U.S.C. § 1301. Hence, Defendants argue, Public Law 280 jurisprudence should apply to tribes in Texas through ICRA.

bring suit in federal court to enjoin any such violations. *See id.*[3]

The Court finds that § 1300g-6 does represent an unequivocal waiver of tribal immunity, and governs the sovereign immunity issue in this case. This holding is reached even though tribal immunity waivers are to be strictly construed, with all ambiguous provisions interpreted in favor of the tribe. *See Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247, 105 S.Ct. 1245, 1258 (1985); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766, 105 S.Ct. 2399, 2403-04 (1985). In addition, the Court finds that Defendants' argument regarding Public Law 280 and the ICRA fails since Congress clearly intended to abrogate the Tribe's immunity for purposes of prohibiting gambling. The Restoration Act is an act related to specific tribes, and was passed almost twenty years after ICRA. *See Morton v. Mancari*, 417 U.S. 535, 550, 94 S.Ct. 2474, 2483 (1974) ("[Absent clear intent by Congress], a specific statute will not be controlled or nullified by a general one.") In addition, Public Law 280 does not apply to Texas tribes. More importantly, the Fifth Circuit Court of Appeals has made it clear that the analysis of gambling on the Tribe's reservation is to be governed exclusively by the Restoration Act. *See Ysleta I*, 36 F.3d 1325, 1332-35 (5th Cir.1994) ("the Restoration Act . . . and not IGRA would govern the determination of whether gaming activities proposed by the Ysleta del Sur Pueblo are allowed under Texas law, which functions as surrogate federal law.") Moreover, the Fifth Circuit implicitly repudiated Public Law 280 jurisprudence in *Ysleta I*.[4] Furthermore, tribal immunity

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[3] The statute reads as follows: "[N]othing in this section shall be construed as precluding the *State of Texas* from bringing an action in the courts of the United States to enjoin violations of the provisions of this section." *See* 25 U.S.C. § 1300g-6(c) (emphasis added).

[4] The lower court determined that IGRA directed courts to adopt the analytical framework of the Supreme Court's ruling in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083 (1987) in

is not a defense to a claim for injunctive relief when brought against tribal officials and the Tribe itself. *See TTEA v. Ysleta Del Sur Pueblo*, 181 F.3d 676, 680-681 (5th Cir.1999);[5] *see also Santa Clara Pueblo*, 436 U.S. at 59, 98 S.Ct. at 1677. Thus, Plaintiff has established a prima facie basis to proceed.

C. Indispensable Party

Defendants' next argument is that the case should be dismissed, pursuant to F.R.C.P. 12(b)(7), unless the United States is joined as an indispensable party. Defendants claim that the United States may eventually bring its own action against the Tribe concerning the same gaming activities, even if Defendants prevail in this case; thus, the potential exists for "inconsistent obligations." (Def. Mot. at 9.) *See* F.R.C.P. 19(a)(ii). The cases cited by Defendants for the proposition that the United States must be joined in every suit involving a federally-recognized tribe are inapposite. The United States was never joined in *California v. Cabazon Band of Mission Indians*, nor did the Supreme Court express any opinion on joinder in that case. *See* 480 U.S. 202, 107 S.Ct. 1083 (1987). In *Carlson v. Tulalip Tribes of Washington*, the Tenth Circuit Court of Appeals held that the United States was an indispensable party only because that case involved a boundary dispute on lands to which the United States possessed fee title. *See* 510 F.2d 1337 (10th Cir.1975). In this case, federal law incorporates state law for purposes of gambling violations. *See Ysleta I*, 36 F.3d at 1335. Thus, legally there should be no inconsistent obligations, since the

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assessing reservation gambling questions. See *Ysleta De Sur Pueblo*, 852 F.Supp. at 593. *Cabazon* was a Public Law 280 case. Thus, by finding that the Restoration Act, and not IGRA, governed a dispute involving the Tribe, it implicitly rejected the "*Cabazon* /Public Law 280" framework. *See Ysleta I*, 36 F.3d at 1335.

[5] The suit in *TTEA* was brought against the Tribe, two tribal judges, and the Tribal Court.

causes of action are the same. Furthermore, the threat of multiple litigation does not, by itself, necessitate joinder. *See Boone v. General Motors Acceptance Corp.*, 682 F.2d 552, 554 (5th Cir.1982); *Delgado v. Plaza Las Americas, Inc.*, 139 F.3d 1, 3 (1st Cir.1998). Accordingly, Defendant's Rule 12(b)(7) claim should be denied.

D. Capacity to Sue

Defendants' last contention is that the Attorney General lacks the capacity to sue on behalf of the State of Texas.[6] Defendants have met the requirement of F.R.C.P. 9(a) by raising the issue of capacity through "specific negative averment." *See* F.R.C.P. 9(a); 6A C. WRIGHT & A. MILLER FED. PRAC. & PROC. § 1559 (2nd ed. 1990) ("FED PRAC. & PROC."). In addressing a "capacity" claim, a Rule 12(b)(6) motion is favored, given that a court cannot grant relief to a party lacking capacity to sue. *See Klebanow v. N.Y. Produce Exch.*, 344 F.2d 294, 296 (2nd Cir.1965); 5 FED. PRAC. & PROC. § 1294. Moreover, having determined that a tribal immunity defense is unavailable, and given that a capacity claim is generally non-jurisdictional, a 12(b)(1) motion is inappropriate. *See TTEA*, 181 F.3d at 680-81; *Brown v. Keller*, 274 F.2d 779, 780 (6th Cir.1960), *cert. denied*, 363 U.S. 828, 80 S.Ct. 1599 (1960) (characterizing capacity claim as non-jurisdictional); *Summers v. Interstate Tractor and Equip. Co.*, 466 F.2d 42, 50 (9th Cir.1972) (same). Consequently, the Court addresses Defendants' capacity claim only as a 12(b)(6) motion.

In analyzing a capacity claim, a federal court must defer to the law of the state in which it sits. *See* F.R.C.P. 17(b). State

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[6] "Lack of capacity" (i.e. a party's right to initiate a suit on behalf of another) should not be confused with "standing" insofar as standing refers to whether a party has a "personal stake in the outcome." *See generally Board of Educ. v. Illinois State Bd. of Educ.*, 810 F.2d 707, 709-10 n. 3 (7th Cir.1987).

law includes constitutions and statutes, as well as judicial decisions construing them. *See* 6A FED. PRAC. & PROC. § 1559; *Klebanow*, 344 F.2d at 297. Thus, the question whether a state attorney general has capacity to sue in a particular case is governed by state law. *See State of Fla. ex. rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 269 (5th Cir.1976); *Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp.*, 309 F.Supp. 1057, 1058 (E.D.Pa.1969). Although at common law the office of attorney general was endowed with broad powers to act in the public interest, assessment of a state attorney general's power is a state-specific inquiry. *See Shevin*, 526 F.2d at 268-69. Thus, the Court must answer the question through reference to the "whole law" of the State of Texas. *See Klebanow*, 344 F.2d at 297; *cf. Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938).

Unlike states such as Maryland, Pennsylvania, and Delaware, no constitutional or statutory provision in Texas grants the AG broad general powers to sue on behalf of the state whenever he or she believes that litigation would be in the public interest. *See Commonwealth of Pa. v. Mid-Atlantic Toyota Distrib.*, 704 F.2d 125, 129 n.7 (4th Cir.1983) (comparing attorneys general in aforementioned states with those in states such as Oklahoma where the office's broad common law authority was eliminated). The general duties of the AG are defined in one provision in the state constitution. *See* TEX. CONST. ART. IV § 21. The AG's powers are further defined in the Texas Government Code. *See* Tex. Gov't Code Ann. § 402.001 *et seq*. Although the AG has the power to "prosecute and defend all actions in which the state is interested before the supreme court and courts of appeals," any admission, agreement, or waiver made by the AG "in a suit to which the state is a party does not prejudice the rights of the state." *See id.* §§ 401.021, 401.004.

More importantly, Texas courts have consistently held that the Texas AG is powerless to act in the absence of explicit statutory or constitutional authorization.[7] Those courts have repeatedly permitted the AG to sue provided that specific authorization could be found in a relevant act.[8] Similarly, they have dismissed actions in which the AG attempted to rely upon implied powers without express authority from the legislature.[9] To the extent that the courts have occasionally broadened the types of actions the AG may bring, or even implied a power to sue, the analysis stemmed from specific

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[7]See *Day Land & Cattle Co. v. State*, 68 Tex. 526, 4 S.W. 865 (Tex.1887) (holding that in the absence of an express law, it would not imply authority from the AG's "general grants of power or imposition of duties . . . [because] in a government in which the duties of all officers, as well as their powers, are defined by written law, no power ought to be exercised for which warrant is not there found."); *Brady v. Brooks*, 99 Tex. 366, 89 S.W. 1052 (1905) (explaining that the framers of the state's constitution had intended to allow "the Legislature to impose upon the Attorney General duties in addition to those expressly defined [in the state constitution] to enable that body to provide that that officer should represent the state in any class of cases where his services should be deemed requisite.")

[8]*See Charles Scribner's Sons v. Marrs*, 114 Tex. 11, 27, 262 S.W. 722, 728 (Tex.1924); *Smith v. State*, 328 S.W.2d 294, 294-95 (Tex. 1959) (per curiam); *Baker v. Wade*, 743 F.2d 236, 242 (5th Cir.1984); *State ex rel. Cavanaugh v. Nelson*, 170 S.W. 814, 815 (Tex.Civ.App.—Amarillo, 1914, no writ).

[9]*See State ex rel. Downs v. Harney*, 164 S.W.2d 55, 56 (Tex.Civ.App.—San Antonio, 1942, writ ref'd w.o.m.) (determining that since the AG's powers could not be enlarged or restricted except in manner authorized by state constitution, AG lacked power to bring action to remove state officials); *Garcia v. Laughlin*, 285 S.W.2d 191, 194 (Tex. 1955) (affirming *Harney*); *State v. Reagan County Purchasing Co.*, 186 S.W.2d 128, 135 (Tex.Civ.App.—El Paso, 1944, writ ref'd w.o.m.) (finding that AG could not determine terms on which public domain could be sold since "acts beyond the scope of his delegated power are not binding on the state"); *Hill v. Tex. Water Quality Bd.*, 568 S.W.2d 738, 740-41 (Tex.Civ.App.—Austin, 1978, writ ref'd n.r.e.) (rejecting AG's "implied common law powers" argument).

statutory provisions, rather than an implied general common law power.[10] Perhaps most importantly, the state legislature has consistently included provisions in its statutes authorizing the AG to sue on the state's behalf whenever it determines that his or her skills are needed.[11] Thus, the "whole law" of Texas indicates that the AG must be given specific authorization in order to bring suit. Cf. *Charles Scribner's Sons*, 114 Tex. at 28, 262 S.W. at 728 ("Fixedness of responsibility is a necessity in government.")

In this case, the AG has cited no statute empowering him to sue the Defendants on behalf of the State of Texas, nor is any grant of authority found in the Texas Penal Code.[12] The AG's claim of authorization through his common law power must be rejected in light of the preceding discussion. Although the AG attempts to characterize § 1300g-6(c) of the Restoration Act as providing him with authority to sue, such a reading would in effect transform Congress into the Texas legislature. *See Mid-Atlantic Toyota*, 704 F.2d at 129 (recognizing that Congress could not redefine powers of state

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[10] *See, e.g., State of Texas v. Scott & Fetzer Co.*, 709 F.2d 1024, 1026 (5th Cir.1983) (determining that state statute allowing AG to recover damages for violation of federal antitrust law permitted him to bring *parens patrie* action); *Agey v. American Liberty Pipe Line Co.*, 172 S.W.2d 972, 974 (1943) (finding clearly implied authorization for AG to enforce civil penalty provision in specific act). Furthermore, to the extent that *Terrazas v. Ramirez* may or may not represent a departure from the general rule, that badly-fractured opinion represents only a small bump on an otherwise smooth jurisprudential plane. *See Terrazas v. Ramirez*, 829 S.W.2d 712 (Tex.1991).

[11] See generally 7 TEX. JUR. 3D § 13 (1980) (listing AG's litigation duties as specified in diverse statutes); *State v. Thomas*, 766 S.W.2d 217, 220 (Tex.1989) (same).

[12] *See* Tex. Pen. Code Ann. § 47.01 et seq.; *see also Lone Starr Multi Theatres, Inc. v. State*, 922 S.W.2d 295, 298 (Tex.App.—Austin, 1996, no writ) (noting that authority to enforce Penal Code is vested exclusively in district and county attorneys, and that AG cannot initiate prosecutions.).

attorney generals); *cf. New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408 (1992) (holding that Congress cannot force state executive officials to enact or administer federal programs). The statute should instead be construed to give the State of Texas the option to enforce its anti-gaming laws in federal court, in accordance with state law. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 1397, (1988) (directing courts to construe statutes to avoid constitutional problems). The burden of proof rests with the AG to identify a source of power authorizing him to exercise this option on behalf of the state. *See Day Land & Cattle*, 68 Tex. at 533-34, 4 S.W. at 867. Thus far, the AG has not met his burden.

Nonetheless, given the competing policy interests in this case, and in light of the fact that dismissal is generally disfavored under the Federal Rules, the Court will afford the AG an opportunity to amend his complaint to properly demonstrate his source of authority, under Texas law, to bring this suit.[13]

It is therefore ORDERED that the Attorney General of the State of Texas file an amended complaint within ten (10) days of the date of this order, specifying the source of his authority under Texas law to enjoin gambling operations. If the Attorney General fails to amend the complaint accordingly within the time specified, Defendants' motion to dismiss under F.R.C.P. 12(b)(6) for lack of capacity will be granted.

It is further ORDERED that in all other respects Defendants' motion to dismiss in the above-styled and numbered cause be, and it is hereby, DENIED.

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[13] Arguably, the AG could characterize Speaking Rock as a "common nuisance" since it appears to be "a place to which persons habitually go for the purpose of . . . gambling in violation of the Texas Penal Code." *See* Tex. Civ. Prac. & Rem. Code § 125.001. The AG has authority to bring suit to abate or enjoin such a nuisance. *See id.* § 125.002. On their face, these statutes appear to confer the necessary authority

Signed And Entered this 2nd day of December, 1999.

/s/ Harry Lee Hudspeth
Harry Lee Hudspeth
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
[Filed Jan 13 2000]

No. EP-99-CA-320-H

STATE OF TEXAS,

Plaintiff,

v.

YSLETA DEL SUR PUEBLO, TIGUA GAMING AGENCY, THE TRIBAL COUNCIL, TRIBAL ACTING GOVERNOR FILBERT CANDELERIA, AND GAMING COMMISSIONER FRANCISCO HERNANDEZ,

Defendants.

ORDER DENYING DEFENDANTS' SECOND MOTION TO DISMISS OR, IN THE ALTERNATIVE, REQUEST FOR CERTIFICATE OF APPEALABILITY

This is an action for injunctive relief brought by the Attorney General of the State of Texas ("AG") to enjoin Defendants from operating a gaming facility called "Speaking Rock Casino," located on the Ysleta del Sur Pueblo Tribe ("Tribe") reservation. The background of this case is found in the Court's order of December 3, 1999. *See State v. Ysleta del Sur Pueblo*, 1999 WL 1211427 (W.D.Tex. 1999) ("Ysleta III"). In that order, the Court directed the AG to file an amended complaint alleging constitutional or statutory authority under state law to bring suit against Defendants. On December 16, 1999, the AG filed a first amended complaint alleging capacity to bring suit in the name of the State of Texas to enjoin and abate a public nuisance. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 125.001-002 (Vernon's 1997)

"Civil Practice Code").[1] On December 23, 1999, the Court ordered Defendants to answer the complaint by January 15, 2000. On December 23, 1999, Defendants filed a notice of appeal of the Court's order of December 3, 1999 to the Fifth Circuit Court of Appeals. On January 7, 2000, Defendants filed the present motion in which they ask the Court to dismiss this case under Rules12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.[2] In the alternative, Defendants request the issuance of a certificate of appealability under 28 U.S.C. § 1292(b). This matter is now ripe for decision.

A. Application of State Law Under Restoration Act

Defendants request dismissal of this case for lack of subject matter jurisdiction or failure to state a claim on the basis that sections 125.001 and 125.002 of the Civil Practice Code form part of a state regulatory scheme. Under section 107(b) of the Restoration Act,[3] the State of Texas has no

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[1] The statutes allow the AG to enjoin several public nuisances, including the "use of any place for . . . (1) gambling, gambling promotion, or communicating gambling information prohibited by law[.]" *See* Tex. Civ. Prac. & Rem. Code Ann. §125.021.

[2] In addition to the "new" 12(b)(6) and 12(b)(1) motion, Defendants also "reassert" their prior motion to dismiss for lack of subject matter jurisdiction and failure to join an indispensable party. The Fifth Circuit has held that parties do not waive their right to appeal an order dismissing claims by failing to raise the issues in a subsequent motion. *See Wilson v. First Houston Investment Corp.*, 566 F.2d 1235, 1237-1238 (5th Cir. 1978), *vacated on other grounds* 444 U.S. 959, 100 S.Ct. 442; *see also* 6 A. WRIGHT & C. MILLER, 6 FED. PRAC. & PROC. §1476 (2nd ed. 1990). Nonetheless, Defendants have decided to "play it safe" by ensuring that the dismissed claims are preserved for appeal. Accordingly, the Court "redismisses" the previous claims.

[3] *See* Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89, §107(b), 101 Stat. 666, 668 (1987) (located at 25 U.S.C. §1300g-6(b)).

general civil or regulatory jurisdiction over the reservation; therefore, Defendants argue, the state public nuisance laws cannot apply on their reservation.

A brief review of the statutory scheme illustrates the flaw in Defendants' reasoning. Section 107(a) of the Restoration Act provides that all gambling activities prohibited under Texas law are also prohibited on the reservation. *See* 25 U.S.C. §1300g-6(a) . Thus any state gambling law becomes federal law for purposes of reservation gambling. *See Yselta del Sur Pueblo v. State of Texas*, 36 F.3d 1325, 1335 (5th Cir. 1994), cert. denied, 514 U.S. 1016, 115 S.Ct. 1358 (1995) ("Ysleta I") ("Texas law . . . functions as surrogate federal law.") The reference in section 107(a) makes clear that "state law" encompasses both civil and criminal statutes. *See* 25 U.S.C. § 1300g-6(a). Although federal courts maintain exclusive jurisdiction over cases involving violations of 107(a), Congress empowered the State of Texas to sue in federal court to enforce the civil and criminal provisions through an injunction. *See* 25 U.S.C. §1300g-6(c).[4] The only other provision in the Restoration Act pertaining to gambling provides that "[n]othing in [the gambling] section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas. *See* 25 U.S.C. § 1300g-6(b).[5] Thus, the plain wording of sections 107(a) and (c)

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[4] Moreover, other courts have determined that Congress is within its power in making state civil and criminal gambling laws applicable in Indian country. *See United States v. Santa Ynez Band of Chumash Mission Indians*, 983 F. Supp. 1317, 1324 (C.D.Cal. 1997) (applying 18 U.S.C. §1166(a) which incorporates state civil gambling provisions into federal law); *United States v. E.C. Investments, Inc.*, 77 F.3d 327, 331 (9th Cir. 1996) (addressing 18 U.S.C. §1955 which does the same for criminal statutes).

[5] Section 1300g-6(b) appears to have been derived from two United States Supreme Court opinions. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083 (1987); B*ryan v. Itasca Cty., Minnesota*, 426 U.S. 373, 96 S.Ct. 2102 (1976). Although the

evince Congress' s clear intent to limit the Tribe's sovereign immunity by allowing the State of Texas to enjoin reservation gambling using state anti-gaming laws. *Accord Ysleta I*, 36 F.3d 1327-29 (reviewing legislative history of Restoration Act); *Ysleta III*, 1999 WL 1211427 at 2 (rejecting sovereign immunity defense).

Undeniably, sections 125.021 and 125.022 of the Civil Practice Code are state laws pertaining to gambling. In addition, there is no issue here regarding the propriety of using an injunction to stop a criminal violation. Courts may enjoin a potential criminal violation only (1) in cases of national emergency; (2) in cases involving a public nuisance; or (3) in cases where a statute grants a court the power to enjoin a crime. *See United States v. Santee Sioux Tribe of Nebraska*, 135 F.3d 558, 565 (8th Cir. 1998), cert. denied, 119 S.Ct. 48 (1998). In this case, there is (1) a statute defining as a public nuisance an establishment where state gambling laws are violated; and (2) federal and state statutes authorizing injunctions against state gambling law infractions. Furthermore, as the Eighth Circuit Court of Appeals has made clear, federal courts should employ state remedies (and hence state injunction procedures) to enforce "surrogate" federal gambling laws against tribes. *See id.* (determining that where Nebraska case law provided for injunctive relief against violations of state gaming laws, federal court was required to enforce "surrogate" federal statute with reference to state law remedy).

Supreme Court in those cases determined that Public Law 280 (18 U.S.C. §1162) did not grant to certain states general civil regulatory authority over tribal reservations, it also held that such authority could be granted where expressly provided by Congress. *See Cabazon*, 480 U.S. at 214-15, 107 S.Ct. at 1091; *Bryan*, 426 U.S. at 383-85, 96 S.Ct. at 2108-09. These cases reinforce the notion that Congress's grant to the State of Texas to exercise regulatory authority over gambling on the Tribe's reservation was valid. *See Cabazon*, 480 U.S. at 207, 107 S.Ct. at 1087 (discussing plenary powers of Congress over tribes).

Defendants nonetheless believe that inasmuch as the Civil Practice Code classifies as nuisances prostitution, certain forms of nude dancing, bullfighting, and discharging a firearm in a public place, in addition to gambling, its application here would effectively grant to the State of Texas general civil regulatory jurisdiction over the Tribe, in violation of the Restoration Act. *See* Tex. Civ. Prac & Rem. Code Ann. § 125.001 (listing nuisances). The flaw with this argument is apparent. Hypothetically, if bullfighting was permitted under Tribal law, and the AG was trying to enjoin a matador from entering the reservation bullfighting ring based on state public nuisance law, section 107(b) would come into play. Moreover, the AG in such a case would unlawfully be using a law related to gambling to expand its regulatory jurisdiction over activities for which the Restoration Act expresses no concern. In this case, by contrast, the AG is only using the Civil Practice Code provisions as they pertain to gambling. Under the Restoration Act, these provisions function as federal laws; they empower the AG, as the representative of the State of Texas, to bring a suit in federal court to enjoin gambling on the reservation. *See* 28 U.S.C. § 1300g-6 (a) and (c). Consequently, the motion to dismiss under Rules 12(b)(1) and 12(b)(6) should be denied.

B. Lack of Capacity

Defendants' newest incarnation of its lack of capacity claim is premised on the notion that both state and federal law must explicitly empower the AG to bring suit on behalf of the State of Texas. This argument stems from Defendants' reading of *State of Texas v. Scott & Fetzer Co.*, a case concerning whether the AG was authorized under state law to bring a *parens patriae* action to recover for violations of federal antitrust law. *See* 709 F.2d 1024, 1024-25 (5th Cir. 1983). The federal statute at issue in *Scott & Fetzer* authorized the AG to bring a *parens patriae* action on behalf of the state, provided that the AG was not prohibited from

doing so under state law. *See id.* at 1025. The defendants argued that since the state law authorizing the AG to bring antitrust suits on behalf of the state did not specifically mention *parens patriae* actions, the AG lacked capacity to sue. *See id.* at 1025-26. The majority determined that the state law implicitly authorized *parens patriae* actions; the dissenting judge thought otherwise. *See id.* at 1027, 1029-30. As Defendants read *Scott & Fetzer,* where Congress allows a state attorney general to bring a suit based on state law, the state statute must (a) name a specific defendant (or at least a general category of defendants, such as "federal antitrust law violators"), and (b) authorize the filing of a lawsuit alleging a federal cause of action.

Defendants' contortion of *Scott & Fetzer*, fails for several reasons. First, the state statute at issue in that case did not specifically identify a class of defendants; it simply allowed the AG to recover "damages provided for by the federal antitrust laws." *See* Tex. Bus. & Com. Code Ann. § 15.40 (Vernon's 1987). Rather, the AG could sue any party who violated federal antitrust laws; similarly, the Civil Practice Code authorizes the AG to sue anyone who runs a gambling casino within the state. Second, Defendants have cited no authority in support of the proposition that the state law allowing the AG to enjoin gambling must specifically refer to the Tribe or its reservation. The Restoration Act allows such suits, and only Congress can waive the Tribe's sovereign immunity; thus, there is no need for the State of Texas to also pass a statute authorizing suits against these particular Defendants. Similarly, the state is not obligated to amend its public nuisance statute to specifically mention the federal cause of action; the Restoration Act solves the problem by "federalizing" all state anti-gaming law. *See* 25 U.S.C. §1300g-6(a). Accordingly, the motion to dismiss for lack of capacity should be denied.

C. Certificate Of Appealability Request

Although Defendants have already "jumped the gun" by appealing the Court's ruling on the AG's capacity to sue, they now ask the Court, pursuant to 28 U.S.C. § 1292(b), to certify this issue for an interlocutory appeal. A Court may certify an issue if it involves a controlling question of law for which there is substantial ground for difference of opinion, and if disposition of the issue by the court of appeals might advance the ultimate termination of the litigation. *See* 28 U.S.C. 1292(b).

The Court finds that the request should be denied. Although the lack of capacity issue is a controlling question of law, Defendants have failed to show that there exists a substantial ground for difference of opinion. *See* C. WRIGHT A. MILLER & E. COOPER, 16 FED. PRAC. & PROC. § 3930 (2nd ed. 1996) (noting that a "matter of first impression" is not synonymous with a "substantial ground"). Neither of the Fifth circuit cases cited by Defendants show that a substantial ground for difference of opinion on the capacity issue exists under these circumstances.[6] Moreover, the only real

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[6] The cases cited include *Scott & Fetzer* and League of *United Latin Amer. Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc) ("LULAC IV"). In *Scott & Fetzer*, Judge Jolly's dissent focused on the fact that the state as a political entity was not the beneficiary of a *parens patriae* action, and that as such the majority had conferred authority on the AG to act where none had been given by the state legislature. *See Scott & Fetzer*, 709 F.2d 1029. In *LULAC IV*, the majority of circuit judges found that the AG lacked power to make policy for the State of Texas; accordingly, the AG could not ignore the wishes of the other state parties he represented by settling an important apportionment case instead of proceeding with the appeal. *See LULAC IV*, 999 F.2d at 840-843. Four dissenting circuit judges argued that the AG had broad common law authority to act on behalf of the state, and could accordingly halt the appeal. *See id.* At 899, 921-925. The dissent based its conclusions on *Terrazas v. Ramirez*, 829 S.W.2d 712 (Tex. 1991), a case in which no clear ruling emerged on whether the AG possessed implied common law power to sue on behalf of the state. *See id.*

controversy over the AG's capacity in past cases involved extensions of the scope of certain statutes and constitutional provisions authorizing the AG to sue on the state's behalf. *See, e.g., Scott & Fetzer*, 709 F.2d at 1024. In this case, the federal and state statutes are clear; no ambiguity in wording calls into question the AG's capacity to bring this suit. *See Singh v. Daimler-Benz, AG*, 800 F.Supp. 260, 263 (E.D.Pa. 1992), *aff'd*, 9 F.3d 303 (3rd Cir. 1993) (denying certification where language in disputed statute was clear). More importantly, in the likely event that the Fifth Circuit found the AG had capacity to sue, whether based on common law authority or the Civil Practice Code, the litigation will be considerably delayed by the appeals process, rather than advanced. *See id.* It is time to move away from the capacity question, and begin the next stage of litigation.

It is therefore ORDERED that Defendants' motion to dismiss in all respects be, and it is hereby, DENIED.

It is further ORDERED that Defendants' request for a certificate of appealability under 28 U.S.C. §1292 (b) be, and it is hereby, DENIED.

SIGNED AND ENTERED this 13th day of January, 2000.

/s/ Harry Lee Hudspeth
HARRY LEE HUDSPETH
United States District Judge

APPENDIX F

STATUTES INVOLVED

25 U.S.C. § 1300g-4(f)

Sec. 1300g-4. Provisions relating to tribal reservation

* * * *

(f) Civil and criminal jurisdiction within reservation

The State shall exercise civil and criminal jurisdiction within the boundaries of the reservation as if such State had assumed such jurisdiction with the consent of the tribe under sections 1321 and 1322 of this title.

* * * *

25 U.S.C. § 1300g-6

Sec. 1300g-6. Gaming activities

(a) In general

All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.-02-86 which was approved and certified on March 12, 1986.

(b) No State regulatory jurisdiction

Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.

(c) Jurisdiction over enforcement against members

Notwithstanding section 1300g-4(f) of this title, the courts of the United States shall have exclusive jurisdiction over any

offense in violation of subsection (a) of this section that is committed by the tribe, or by any member of the tribe, on the reservation or on lands of the tribe. However, nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
PECOS DIVISION

CIVIL NO. P 93 CA 029

YSLETA DEL SUR PUEBLO,
Plaintiff,

v.

STATE OF TEXAS and ANN RICHARDS,
GOVERNOR OF THE STATE OF TEXAS.
Defendants.

AFFIDAVIT OF MIGUEL PEDRAZA

THE STATE OF TEXAS
KNOW ALL MEN BY THESE PRESENTS:
COUNTY OF EL PASO

BEFORE ME, the undersigned Notary Public, on this date personally appeared MIGUEL PEDRAZA, who being by me duly sworn upon his oath, deposed as follows:

My name is MIGUEL PEDRAZA. I am competent to make this affidavit. Every statement herein is within my personal knowledge and is true and correct.

I am a member of the Ysleta del Sur Pueblo. I am the Census Director for the Ysleta del Sur Pueblo. I have in my possession, custody, and control, the census records of the Pueblo. The information contained in this affidavit is compiled from such records.

The Ysleta del Sur Pueblo is located approximately 15 miles southeast of Downtown El Paso, and is within walking distance of the border between the United States and the Republic of Mexico. Pueblo realty totals 28.7 developed acres in non-contiguous locations used for housing and tribal administrative purposes, and another 37.3 acres of non-developed desert land. Tribal membership is 1,284 persons. The Tribe is governed under a traditional Pueblo system with a nine member tribal council, which consists of the Cacique, Governor, Lieutenant Governor, War Captain, Aguacil, and four councilmen at large.

On August 18, 1987, the United States Congress passed PL 100-89, which provided for the restoration of the federal trust relationship and the federal services in assistance to the Pueblo.

A 1993 census analysis indicates that 945 tribal members live within the immediate service area of the Pueblo and 339 tribal members live outside El Paso and Hudspeth County, Texas. These numbers do not include the number of non-eligible housing project and surrounding neighborhood residents that do not meet the 1/8th blood quantum necessary for tribal membership. As of March 17, 1993, 636 females compromise 50% of the total tribal population with the remaining 50% comprised of 634 males.

In March of this year, I and Census Officer Elias Torrez performed an income analysis of tribal membership. Sixty-eight percent of the heads of household have less than $15,000 in annual income, with and additional 16% receiving less than $5,000 annually. Only 1.5% of the head of households earn an annual income greater than $30,000.

Further, Affiant saith naught.

/s/ Miguel Pedraza
MIGUEL PEDRAZA

SUBSCRIBED AND SWORN TO BEFORE ME on this the 21st day of July, 1993, to certify which witness my hand and official seal.

/s/ Illegible
Notary Public
State of Texas

My Commission Expires:
2-11-95

APPENDIX H

[El Paso Times Monday, March 5, 2001]

Our Views

Tiguas gain momentum

House committee favors tribal casinos

Texas Attorney General John Cornyn maintains that, according to Texas law, Speaking Rock Casino in El Paso is an illegal gaming operation.

So, the attorney general is doing his job, following the law as his office interprets it, and is suing to shut down the Tiguas.

Fortunately, the legalization of gambling at Speaking Rock and two other Native American reservations in Texas now appears to be a real possibility.

In a move that looks promising for the Tiguas—and El Paso—a Texas House committee voted last week in favor of legislation that would legalize gaming at Speaking Rock. With any luck, this might spell the beginning of the end for the divisive, bitter and counterproductive fighting that's been going on for nearly a decade between the Tiguas and the state.

Speaking Rock has proved to be a boon to the Tiguas and El Paso. It attracts people to an area where few people would otherwise go. It has helped to boost interest in the Lower Valley and Mission Trail area. It has contributed big bucks to the El Paso economy; the casino generates about $60 million in revenues per year.

And possibly most important, Speaking Rock has improve the quality of life for the Tiguas. Tigua Gov. Albert Alvidrez told the committee that joblessness has virtually vanished

from the 1,254-member tribe, and that the casino has helped the Tiguas to overcome poverty and a sense of hopelessness.

Cornyn has been doing the right thing—following the law. And he's doing the right thing now—reviewing the Indian gaming bill and deciding what it's going to mean to the state's legal pursuit of the Tiguas. It's to be hoped that Cornyn keeps doing the right thing and drops the suit. The Tiguas need to be able to operate without the cloud of legal action hanging over them.

An important thing to notice about the Indian gaming bill is that it is not a blanket acceptance of casino-type gambling for Texas. Those who are worried, and with some good reason, about the moral implications of the gambling needn't worry that a casino will spring up in every town.

The measure applies only to the Tiguas, the Kickapoos in Maverick County and the Alabama-Coushatta tribe of Polk County—and only on their existing reservations. In that light, according to the bill's authors, it is actually anti-gambling-proliferation because its focus is so narrow.

At this time there appears to be no organized opposition to the legislation. The House and Senate appear friendly toward the bill. The benefits far outweigh any drawbacks. The El Paso businesses community is behind the bill.

The House and Senate should pass the Indian gambling bill as expeditiously as possible.